

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUN 02 2010

JAMES R. LARSEN, CLERK  
DEPUTY  
SPOKANE, WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CECILIO FERNANDEZ ESTRADA,

Petitioner,

vs.

PAT GLEBE,

Respondent.

NO. CV-10-072-JPH

**ORDER STRIKING PREVIOUS DISMISSAL  
ORDER, ADOPTING REPORT AND  
RECOMMENDATION IN PART AND  
MODIFYING IT IN PART, AND  
DISMISSING PETITION WITHOUT  
PREJUDICE**

BEFORE THE COURT is Petitioner's Response to Report and Recommendation and Motion to Dismiss Without Prejudice or Motion for Leave to Amend and to Stay and Abey (Ct. Rec. 14). This action was dismissed in error by Order entered May 28, 2010. Accordingly, **IT IS ORDERED** that Order (Ct. Rec. 13) is **STRICKEN**.

On May 14, 2010, Magistrate Judge Hutton recommended dismissal of this action with prejudice as Mr. Estrada's claims were time-barred under 28 U.S.C. § 2244(d). Petitioner has indicated he agrees with the Magistrate Judge's recommendation, but requests this action be dismissed without prejudice. In the alternative, he seeks permission to amend his petition to state only an ineffective assistance of counsel claim, and then to stay the action and hold it in abeyance while he exhausts that claim in state court.

ORDER -- 1

1 A federal court, however, would only have authority to stay a  
2 petition containing exhausted claims. Because Mr. Estrada offers no  
3 exhausted claims at this time, the court cannot grant a request for a  
4 "stay and abeyance." See *Zarvela v. Artuz*, 254 F.3d 374, 382 (2nd Cir.  
5 2001). Therefore, **IT IS ORDERED** Petitioner's alternative Motion for  
6 Leave to Amend and to Stay and Abey is **DENIED**.

7 Petitioner also asks this action be dismissed without prejudice to  
8 filing a new action once he has exhausted state court remedies. It is  
9 unclear at this time whether Mr. Estrada could present grounds to toll  
10 the limitations period on a future claim of ineffective assistance of  
11 counsel. In the event he is able to do so, he must continue to be  
12 mindful of the one year period of limitations set forth in 28 U.S.C. §  
13 2244(d). Failure to timely file a federal habeas petition would be cause  
14 for dismissal.

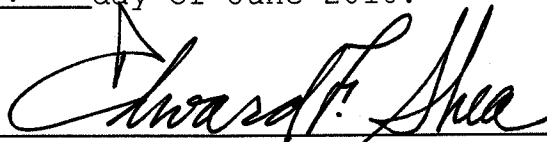
15 Petitioner is advised the one year limitations period is not  
16 statutorily tolled during the pendency of a federal habeas petition, see  
17 *Duncan v. Walker*, 533 U.S. 167 (2001), and has continued to run while  
18 the present petition has been before this Court. Furthermore, although  
19 dismissal of this action according to Mr. Estrada's request may  
20 ostensibly be without prejudice, it might actually result in a dismissal  
21 *with prejudice* unless Petitioner could establish that at the time of  
22 dismissal he was entitled to equitable tolling. See *Ford v. Hubbard*, 330  
23 F.3d 1086, 1101 (9th Cir. 2003).

24 Therefore, **IT IS ORDERED** the Report and Recommendation (Ct. Rec.  
25 12) is **ADOPTED in part** and **MODIFIED in part** and the Petition is  
26 **DISMISSED without prejudice**.

27 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
28 **ORDER -- 2**

1 this Order, enter judgment, forward a copy to Petitioner, and close the  
2 file. The Court further certifies that pursuant to 28 U.S.C. §  
3 1915(a)(3), an appeal from this decision could not be taken in good  
4 faith, and there is no basis upon which to issue a certificate of  
5 appealability. 28 U.S.C. § 2253(c); Fed. R.App. P. 22(b).

6 **DATED** this 15<sup>th</sup> day of June 2010.

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9 EDWARD F. SHEA  
United States District Judge

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